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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1970

Misc. No. 823

SYLVESTER RILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT

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SYLVESTER RILEY,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on September 9, 1970.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported in per curiam judgment handed down on September 9, 1970 (C.A. No. 25643; decision appended, Appendix A)

GROUNDS OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit, affirming the judgment below, was filed and entered September 9, 1970. Jurisdiction of this Court on certiorari is based on 28 U.S.C., §1254(1).

Jurisdiction of this Court on certiorari is also based on Rule 19 of the Rules of the Supreme Court which provides in the relevant section that the Court may grant certiorari to review cases "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . ."

The Petitioner contends that the decision of the United States Court of Appeals for the Ninth Circuit is in direct conflict on the issue of search and

seizure with United States v. White, 405 F.2d 838 (7th Cir. 1969), cert. granted 394 U.S. 957, further argument, 396 U.S. 1035 (1970).

QUESTION PRESENTED

WAS THE EVIDENCE USED AS THE BASIS FOR ARREST AND CONVICTION OBTAINED IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions involved are:

United States Constitution,
Fourth Amendment
21 U.S.C., §176(a)

STATEMENT OF THE CASE

The facts material to the questions presented are as follows:

A. Search and Seizure

On February 19, 1969, Lawrence Porter was taken into custody along with a second

person for conspiracy to smuggle heroin. The arrest took place in Calexico, California, and was executed by agent Miller, a treasury agent attached to the Bureau of Customs. Miller informed Porter and his companion of their constitutional rights; whereupon, Porter indicated he would like to make a statement. Among the things which Porter related to Miller was the assertion that he, Porter, was an addict and that the heroin his companion was carrying was for Porter's personal use. He had obtained the heroin, he said, while in Mexico on a job for a man he identified as Teddy Riley.

Porter further stated that he had been paid to drive a car into Mexico, leave it there and then pick it up later at a spot located in Calexico, California. Porter informed Miller where the pick-up point was. Porter also stated that he had taken a car across the border for Riley on a previous occasion. Porter then offered to cooperate with the government and deliver the contraband to the ultimate receivers in Los Angeles. Miller stated that he would want Porter to be monitored with a transmitter and they would

record whatever conversation Porter had with the person he contacted, and also that they would want to record any telephone conversations. Porter assented (R.T. pp. 91-92, 96).

Miller then asked customs agents Bancroft and Richenberger to check to see if a vehicle was parked at the location Porter had given, and if it was in fact loaded with marihuana. Richenberger returned with the car and 101 kilograms of marihuana were recovered (R.T. p. 93).

No warrant had been obtained for the search and seizure of the vehicle. Nor had a court order been obtained allowing the agents to proceed with their plan to have a transmitting device used to record his personal and telephonic conversations (R.T. pp. 97, 99). Miller never saw the vehicle which was searched by Bancroft and Richenberger come across the border; the vehicle was found on the United States side of the border. The marihuana that was found was concealed in the door panels, back seat, seat rest, and bottom of the seat. Miller did not know the source of the marihuana (R.T. pp. 101, 105-09).

The marihuana which Bancroft and Richenberger found was in kilo brick form; there were approximately 101 bricks in the car of which 23 were left in the vehicle for the trip to Los Angeles. All of the marihuana that was left in the car was concealed (R.T. pp. 201-06, 208, 215-16).

Agent Miller and Porter then drove the car carrying the reduced amount of contraband from Calexico, California, to Los Angeles, California. Agents Richenberger and Quick were in the two other government vehicles conducting surveillance of Miller and Porter.

Porter and Miller arrived in Los Angeles at 11:00 p.m., February 19, 1969, and went to the Federal Building, where customs agent Enoch placed a monitoring device transmitter under the dashboard of Porter's car and customs agent Quick placed a transmitting device on the person of Porter. Porter, Miller, and customs agents Hopkins and Quick proceeded to a pay telephone in the vicinity of Sixth and 36th Street. An induction coil was placed on the receiver of the telephone and

connected to a recorder, and Porter phoned the telephone number which he had in his possession. This conversation was recorded and monitored by Miller and other customs agents (R.T. pp. 167-69). The party that Porter called never identified himself (R.T. pp. 194-95).

Porter then drove the car to the house under surveillance. Porter parked the car and went into the house. Agents Miller, Quick and Hopkins monitored the conversation in the house. Some time later appellant and Porter left the house together. Appellant drove Porter home and was arrested at that time (R.T. pp. 253-54). No contraband was found on appellant at the time of his arrest (R.T. p. 435).

Agents McDaniels and Richenberger were conducting surveillance of the back of a house in the 600 block of Sixth Street in Los Angeles, California. During this surveillance agent McDaniels observed a 1960 Ford similar to that driven by Porter and Miller from Calexico proceed a short distance down the alley to a garage. McDaniels then observed Brown get out of

the car, open the garage doors, and then back the car into the garage, and pull the garage doors closed behind him. McDaniels then approached the garage and entered the backyard with agent Richenberger. Brown emerged from the garage and was placed under arrest. McDaniels then entered the garage and observed the left door of the Ford vehicle opened and further observed that the back seat had been pulled slightly up and forward. Agent McDaniels saw several packages underneath the bottom portion of the seat. After Brown had been arrested McDaniels drove the 1960 Ford to Terminal Island to the customs house where the vehicle was placed in a seizure lot. McDaniels observed 23 packages wrapped in red and white paper and containing a green leafy substance (Peo. Exhs. 8 through 31, collectively) underneath the rear seat of the Ford (R.T. pp. 392-97).

B. District Court Proceedings

The jurisdiction of the United States District Court for the Central District of California was based on 18 U.S.C. §3231 (62 stat. 826), being a proceeding on an

indictment which was filed March 12, 1969 (C.T. p. 1) charging the appellant with violating Title 21, U.S.C. §176(a) in that appellant did, with intent to defraud the United States, knowingly receive, conceal and facilitate the transportation and concealment of approximately 23 kilograms of marihuana, which said marihuana, as the appellant then and there well knew theretofore had been imported and brought into the United States contrary to the law (C.T. p. 1).

Appellant pleaded not guilty (C.T. p. 3). Appellant and co-defendant filed Notices of Motion and Motion for Suppression of Evidence (C.T. pp. 31-41). A Supplemental Motion to Suppress Testimony of Customs Agents as to Any Conversations Overheard by Means of an Electronic Eavesdropping Device was filed by appellant (C.T. pp. 42-48). The Government filed a Response Opposing appellant's Motion to Suppress Evidence (C.T. pp. 51-60). Appellant filed a Reply to Plaintiff's Opposition to Motions to Suppress Evidence (C.T. p. 79).

The trial was commenced on May 28,

1969 (C.T. p. 82). Appellant and co-defendant Brown made motions to suppress and moved for judgment of acquittal; both motions were denied (C.T. p. 97).

The jury found appellant and co-defendant guilty (C.T. p. 98).

The per curiam opinion of the Court of Appeals affirmed the judgment of the trial court and rejected the Petitioner's contention that evidence introduced at the trial had been obtained as the result of an illegal search and seizure. Petitioner submits that the Court of Appeals decision is directly in conflict with an opinion handed down in the 7th Circuit in the case of United States v. White, 405 F.2d 838 (7th Cir. 1969), cert. granted 394 U.S. 957, further argument, 396 U.S. 1035 (1970), and that the decision in White, supra, should have been applied in this case and the judgment of the District Court reversed.

SUMMARY OF ARGUMENT

In the instant action, the evidence introduced against the appellant was obtained without a warrant, was the result of an illegal search and seizure and therefore should have been excluded.

ARGUMENT

It is well established that evidence obtained by federal officials as the result of an illegal search and seizure is inadmissible into evidence in a federal prosecution. Weeks v. United States, 232 U.S. 383 (1914). The exclusionary rule has further been extended to include evidence obtained as the result of information or leads received or secured by means of an unreasonable search and seizure. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). These rules include confessions made by a defendant after he has been informed of the seizure of the evidence (Fahy v. Connecticut, 375 U.S. 85 (1963), and evidence obtained as the result of an unlawful arrest. Wong Sun v. United States, 371 U.S. 471 (1963).

It is well established law that a warrantless search can survive constitutional inhibition only upon a showing that it comes within an exception to the rule that a search must rest upon a search warrant; e.g., if the search is contemporaneous with an arrest and confined to the vicinity thereof, or that a search is made with consent. In the instant case there were no search or arrest warrants, and the burden thus falls upon the Government to put said searches into the exception category. Stoner v. California, 376 U.S. 483, 486 (1964); Jones v. United States, 357 U.S. 493, 499 (1958); Corngold v. United States, 367 F.2d 1, 3 (9th Cir. 1966); Angelo v. United States, 269 U.S. 20 (1925); Jeffers v. United States, 342 U.S. 48, 51 (1951).

Where the primary purpose for an arrest is to conduct a search and no warrant is obtained, the search is unreasonable. An arrest may not be used as a pretext to search for evidence. United States v. Lefkowitz, 285 U.S. 452 (1966). Searches conducted without warrants have been held unlawful:

"Notwithstanding facts unquestionably showing probable cause . . . . "

Angelo v. United States, 269 U.S. 20, 33.

For the Constitution requires,

"That the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . . "

Katz v. United States, 389 U.S. 347, 357 (1967).

The Supreme Court of the United States has held on several occasions that where the securing of a search warrant is reasonably practicable, a search warrant must be obtained and used. McDonald v. United States, 335 U.S. 451 (1948). Where the securing of a search warrant is reasonably practicable, it must be used. Carroll v. United States, 267 U.S. 132.

In the instant case, the agents did not obtain search warrants, arrest warrants or an order allowing them to have a transmitting device on Porter (R.T.

pp. 97, 99). While the agents had time to stop at the Federal Building in Los Angeles, unload part of the contents of the car and install bugging devices, they made no pretext or attempt to obtain a search warrant which would have been readily available to them while they were at the Federal Building, provided, however, that they had probable cause to convince a magistrate that such a warrant should issue. It can only be assumed that in their haste to make an arrest, and due to the fact that they could only present Porter, who was in need of a fix and on some type of "tranquilizer" to a magistrate as the sole basis for the issuance of a warrant, that the agents felt they would be unable to obtain same.

Appellant contends that this case does not fall within the exceptions to the rule that a search warrant need not have been obtained, and therefore, the resulting search was invalid, and that the search fell within the rule set forth in Katz v. United States, 389 U.S. 347, 357 (1967), that a search without prior approval is "per se" unreasonable under the Fourth Amendment.

Appellant's attorney made strenuous objections to both the border search, the telephonic eavesdropping, and other searches at the time of trial, but his motions to suppress the evidence were denied (R.T. pp. 146-161). While the trial judge found that the tape in Porter's car was illegal in spite of his consent, he allowed in evidence the tapes of the telephonic conversations between Porter and Brown (R.T. pp. 244-46; 250-51; 350-51). It is difficult to distinguish the difference between the eavesdropping in Porter's car which was held to be illegal in spite of his consent, and the tape of the telephone conversation between Brown and Porter which was held to be legal. Appellant contends that there is in fact no difference, and both tapes should have been excluded. Additionally, since all of the defendants were jointly charged with the concealment, transportation or facilitating the transportation of marihuana in the Indictment, all have standing to object to the introduction of the evidence. Jones v. United States, 362 U.S. 257, 264 (1959). Furthermore, when the possession of the seized evidence

is itself an essential element of the offense with which the appellant is charged, the Government is precluded from denying that appellant has the requisite possessory interest to challenge the admission of the evidence. Simmons v. United States, 390 U.S. 377 (1967).

The general rule under Title III Omnibus Crime Control and Safe Streets Act of 1968 is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant. Alderman v. United States, 394 U.S. 165, 175 (1968). In the Alderman case the Supreme Court held that a violation of the defendant's rights was involved even though the defendant did not participate in the conversation.

Under the ruling in United States v. White, 405 F.2d 838 (7th Cir. 1969), cert. granted 394 U.S. 957, further argument, 396 U.S. 1035 (1970), the Court reversed a conviction for narcotics violations because the trial court permitted the introduction into evidence of incriminating statements made by the defendant and

overheard by Government agents by means of electronic eavesdropping.

The eavesdropping was accomplished by placing a radio kel set, a small transistorized device which transmits voices or sounds that are picked up by receiving units, on the person of an informer who talked with the defendant at various locations, including the defendant's home, automobile and place of business, as well as at the informer's home. No search warrant or court order authorizing the eavesdropping was obtained. The informer was not produced by the Government and did not testify, but the Bureau of Narcotics agent testified to the defendant's incriminating conversations with the informer that were picked up from the informer's kel set.

The use of this evidence, the Seventh Circuit decided, fell within the doctrine of Katz v. United States, 389 U.S. 347 (1967), and violated the defendant's rights under the Fourth Amendment to be free from governmental intrusion by unreasonable search and seizure.

The Government argued that this case was not controlled by Katz, because here one of the parties to the conversations, the informer, was cognizant of and consented to the eavesdropping. But this difference, the Court thought, was without legal significance.

> "Each act was a part of a 'bugging' technique by which a conversation was transmitted to an 'uninvited ear' - government agents. The crucial fact in each case is that the respective speakers did not consent to the overhearing of their statements and that the conversations were overheard by third persons uninvited by the speaker."
>
> United States v. White,
>
> 405 F.2d at 483.

One party cannot waive the Fourth Amendment rights of another, the Court added.

The Court went on further to hold in White that the agents should have obtained a warrant authorizing the use of the

device, the Court observed, as it pointed out that it could find no behavior on the part of the defendant to support a waiver of his rights. Nor could the Court accept the Government's argument that the defendant had exposed himself to being overheard. "A realistic appraisal of the defendant's conduct permits no other conclusion than that he justifiably expected his conversations to be private" (at page 846).

The Court further held in White that the decision in On Lee v. United States, 343 U.S. 747 (1952) had been superseded by Katz, and had suffered an erosion of its decisional basis in other Supreme Court decisions.

Additionally, in Katz v. United States, 389 U.S. 347, 356 (1967), the Supreme Court held that the Fourth Amendment was meant to protect one's privacy and extended not only to the seizure of tangible items, but to the recording of oral statements as well.

"Like physical evidence which might be seized, overheard conversations are fruits of an illegal entry and are inadmissible in evidence."

Alderman v. United States, supra, 394 U.S. 165, 177-178 (1968).

It would therefore seem automatic that if United States v. White is a correct statement of the law after Katz, then the electronic eavesdropping in the instant case should have been suppressed.

Petitioner further submits that if one of the bases for the alleged "probable cause" is the result of an unlawful wiretapping or interception of a phone call by either of the defendants, the balance of the information would be tainted as the product of evidence illegally seized and should have been suppressed at the trial. Silverthorne Lumber Co., Inc. v. United States, 251 U.S. 385 (1966); Jones v. United States, 357 U.S. 493 (1959); Katz v. United States, 389 U.S. 347 (1967). It is also submitted that since the Government did not meet its burden and

prove that the evidence which was the result of an illegal exploitation was purged of any taint, that such evidence was inadmissible as the fruit of the poison tree. Alderman v. United States, supra, 394 U.S. 165, 181 (1968).

CONCLUSION

Appellant was denied a fair and impartial trial because the evidence obtained as a result of an unlawful search and seizure was improperly used to obtain his conviction of the charge alleged.

Respectfully submitted,

JOSEPH T. VODNOY

Attorney for Appellant
Sylvester Riley

APPENDIX "A"

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff and Appellee,	)	No. 25,618
vs.	)	No.
NOEL BROWN, Appellant.	)	25,618
UNITED STATES OF AMERICA, Plaintiff and Appellee,	)	
vs.	)	No.
SYLVESTER RILEY, Appellant.	)	25,643

On Appeal from the United States District Court for the Central District of California

Before: CHAMBERS and HUFSTEDLER, Circuit Judges, and PECKHAM, District Judge.

Per curiam:

The judgments of conviction are affirmed.

We find no illegally "seized" evidence as a matter of law, no illegal search under the circumstances, and find adequate evidence to support the verdict.

On the first contention the court accepts United States v. Polansky, 418 F.2d 1069 (2d Cir., 1969); United States v. Tropiano, 418 F.2d 1069 (2d Cir., 1969); Doty v. United States, 416 F.2d 887 (10th Cir., 1968); and Dryden v. United States, 391 F.2d 214 (5th Cir., 1968).

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 823

SYLVESTER RILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A), is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1970. The petition for a writ of certiorari was filed on October 8, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the marihuana introduced into evidence was unlawfully seized.

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2. Whether the court erred in admitting into evidence recordings of a telephone conversation made with the consent of one of the parties to the conversation.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner and co-defendant Brown were convicted of knowingly receiving, concealing, and facilitating the transportation and concealment of marihuana in violation of 21 U.S.C. 176a. Petitioner was sentenced to five years' imprisonment and the court of appeals affirmed *per curiam*.

The evidence showed that on February 19, 1969, one Lawrence Porter and another were placed under arrest in Calexico, California for conspiracy to smuggle heroin into the United States. After being informed of his constitutional rights, Porter admitted that the heroin was his (Tr. 237); he told agent Miller that he had been paid $250 by "Teddy Riley" to drive a car into Mexico, leave it there to be loaded with marihuana, and then pick it up later at a spot located in Calexico, California (Tr. 89–91, 237–240). He was to drive the car to Los Angeles and call a telephone number provided by petitioner Riley (Tr. 89–91, 237–240).

Porter agreed to cooperate with the government and deliver the contraband pursuant to his original instructions. He further agreed that the agents could fit him with a radio transmitter to record conversa-

tions with his contact and that the agents could record any of his telephone conversations (Tr. 91–92, 241).

Subsequently, the "loaded" car was found parked at the Calexico location given by Porter (Tr. 93), and was seized by two agents. Agent Miller and Porter drove the vehicle to Los Angeles where Porter was outfitted with a radio transmitter; they then proceeded to a telephone booth and Porter called the number in his possession. This conversation was recorded and played at the trial (Tr. 167–169, 249). Porter recognized the other voice as that of Brown (Tr. 243–244).[1]

After the telephone conversation, Porter drove the car to a house where he met petitioner and co-defendant Brown. Agents monitored the conversations held between the three men; later petitioner and Porter left the house together. Petitioner drove home and was arrested at that time (Tr. 389–392, 415–420). Brown was arrested after he had driven the "loaded" car to a garage.

The court did not permit agent Miller to testify as to what he heard with the aid of the monitoring device, saying that the tape should be played rather than permitting testimony as to somebody's interpretation (Tr. 386). The recording of the conversation between Porter and the two defendants was, how-

[1] During the trial the court instructed the jury that since petitioner was not part of this telephone conversation no part of it could be held against him (Tr. 247). Similar admonitions were given on two other occasions (Tr. 252, 364).

ever, almost entirely inaudible (Tr. 356–357) and therefore the full tape was not played at the trial (Tr. 385–386).

ARGUMENT

1. Petitioner claims that the marihuana introduced into evidence was unlawfully seized and therefore inadmissible against him. The marihuana was first seized in Calexico after Porter had told the agents that the car was "loaded" and had given them the location of the automobile. It was replaced in the car and was then seized after Brown's arrest. On both occasions the agents had authority to seize the marihuana which was known to have been smuggled into the United States. *Chambers* v. *Maroney*, 399 U.S. 42; *Carroll* v. *United States*, 267 U.S. 132.

2. Petitioner further contends that use of the tape recordings violated his Fourth Amendment rights. Since the tape recording of the conversation between the informant and defendants prior to their arrest was not actually utilized at trial, and since the court did not permit government testimony relating to the overhearing of that conversation on a Kel device, the main issue involves use of recordings of a telephone conversation between co-defendant Brown and the informer, made with the latter's consent.

Aside from the issue of standing,[2] petitioner errs in his assumption that the ruling in *United States* v.

[2] In instructing the jury not to consider the conversation against petitioner, the court went further than necessary since the act of Brown in making arrangements was in furtherance of the joint venture.

White, 405 F. 2d 838, certiorari granted, 394 U.S. 957, No. 13, this Term, governs the determination here. Expectations of privacy as to telephone conversations are significantly less than in face-to-face conversation with another individual. A person who talks over the telephone must be deemed to assume a reasonable risk that the other party is either recording the conversation or allowing another person to listen, either on the same earpiece or on an extension. See, *e.g.,* the government's briefs in opposition in the following cases: *Fukumoto* v. *United States,* No. 1359 Misc., O.T. 1969, certiorari denied, 397 U.S. 998; *Lopez* v. *United States,* No. 5053 this Term; *Hudson* v. *United States,* No. 5795, this Term; *Trigg* v. *United States,* No. 5894, this Term. Accordingly, there is no need to hold this case pending decision in *White.*

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
MICHAEL C. SLONSKY,
Attorneys.

NOVEMBER 1970.

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